BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JEFFREY W. MARSOLF Claimant V. **LECHNER LANDSCAPE & LAWN SERVICE, LLC, and LUXURY LAWN & LANDSCAPING, LLC** Respondents AND **ACCIDENT FUND INSURANCE COMPANY OF AMERICA and KANSAS BUILDERS INSURANCE GROUP** Insurance Carriers	)	Docket Nos. 1,018,345 & 1,073,120

ORDER

Respondent Lechner Landscape & Lawn Service, LLC, and its insurance carrier Accident Fund Insurance Company of America (Lechner and Accident Fund) appealed the June 27, 2016, Order entered by Administrative Law Judge (ALJ) Ali Marchant. Phillip B. Slape appeared for claimant. Matthew J. Schaefer appeared for Lechner and Accident Fund.[1] Roy T. Artman appeared for Luxury Lawn & Landscaping, LLC, and Kansas Builders Insurance Group (Luxury and Kansas Builders).

RECORD

The record considered by the Board is the same as that considered by the ALJ.

ISSUE

Docket No. 1,018,345 is a post-award medical proceeding for an accidental injury that occurred on February 21, 2004. Docket No. 1,073,120 is a preliminary hearing

[1] In Docket No. 1,018,345, Joseph Seiwert appeared on behalf of claimant and filed an attorney fee contract. Jeffery R. Brewer represented Lechner and Accident Fund. No orders have been issued allowing either attorney to withdraw.

proceeding for an injury by accident that occurred on December 22, 2014. The ALJ succinctly framed the issue when she stated:

> Claimant sustained a previous work-related injury on February 21, 2004, while working for Lechner. He received medical treatment, and his case was settled on a running award leaving all future rights open on August 15, 2005. Claimant sustained a new injury on December 22, 2014, while working for Luxury. Claimant is now seeking the authorization of medical treatment for his cervical spine. The primary issue before the Court is determining whether Claimant's current need for medical treatment arises out of his first accident while working for Lechner, his second accident while working for Luxury, or neither work-related accident.[2]

The ALJ ultimately determined claimant's current condition and need for medical treatment were a natural and probable consequence of his 2004 accident at Lechner, not his 2014 accident at Luxury. The ALJ ordered Lechner to provide a list of three physicians from which claimant could select one for medical treatment.

Lechner filed an application for review. Lechner asserts claimant's need for medical treatment was caused by his 2014 work accident or neither his 2004 nor 2014 accidents. Claimant and Luxury ask the Board to affirm the June 27, 2016, Order.

The issue is whether claimant's current cervical condition and need for treatment were the probable and natural result of his 2004 accident, whether his 2014 accident was the prevailing factor causing his current medical condition and need for treatment or neither.

FINDINGS OF FACT

The facts contained in the June 27, 2016, Order are detailed and extensive. It is unnecessary to repeat those facts and they are incorporated by reference herein. This Board Member notes the following facts for their significance:

As noted by the ALJ, claimant settled his claim in Docket No. 1,018,345 for a February 21, 2004, accident while working for Lechner. The claim was settled on a running award and all rights were left open, including future medical treatment. No depositions or hearings were held prior to this claim being settled. In 2005, claimant filed an application for post-award medical benefits seeking treatment for bilateral carpal tunnel syndrome which he alleged was related to his 2004 accident. The ALJ and Board denied claimant's request. No further activity in that claim took place until claimant filed the current application for post-award medical benefits on September 25, 2015.

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[2] ALJ Order (June 27, 2016) at 1.

In Docket No. 1,073,120, claimant filed an application for hearing alleging a December 22, 2014, accident while working for Luxury. The details of that accident and subsequent medical treatment are set forth in the ALJ's Order.

At the June 16, 2016, hearing in both claims, the ALJ stated, "And as I stated before, we are here for both a preliminary hearing and a post-award medical hearing. However, because the facts of both hearings are so intertwined, we are consolidating them for hearing purposes."[3] Neither party objected and no written order was issued consolidating the claims for all purposes. The ALJ's Order indicates the two claims were consolidated for litigation purposes. No party appealed the consolidation.

At his deposition, claimant indicated his low back and left knee pain were related to his 2014 accident, not his 2004 accident. He testified Drs. Estivo, Pratt and doctors at Via Christi told him he had degenerative disc disease and his problems were not related to one particular accident. "They just tell you that it has nothing to do with my injury. I mean, has nothing to do with me getting knocked down, it has nothing to do with my surgery 12 years ago; it just has everything to do with, yeah, you are getting old. And to me, that's quack-ish."[4]

Claimant indicated that since his 2014 accident, he has taken off work 20 or more days because of neck issues. He estimated he took off work 100 days prior to his 2014 accident because of neck pain and his neck has "never been right."[5]

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is

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[3] P.A.M. & P.H. Trans. at 5.

[4] Claimant Depo. at 49.

[5] *Id.* at 52.

[6] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

not bound by medical evidence presented in the case and has a responsibility of making its own determination.[7]

The burden is upon claimant to prove his current cervical condition and need for treatment were the probable and natural result of his 2004 accident or that his 2014 accident was the prevailing factor causing his current medical condition and need for treatment.

Lechner argues claimant failed to prove his cervical condition and need for medical treatment arose from his 2004 accident. Lechner asserts claimant's preexisting cervical condition was aggravated by his 2014 accident. Lechner also contends claimant sustained a cervical sprain/strain as a result of the 2014 accident. The Board affirms the ALJ's Order and adopts her well-written recitation of the applicable law and her legal conclusions.

CONCLUSION

Claimant's current cervical condition and need for treatment were the natural and probable consequence of his 2004 accident at Lechner, not his 2014 accident at Luxury.

WHEREFORE, the Board affirms the June 27, 2016, Order entered by ALJ Marchant.

IT IS SO ORDERED.

Dated this ____ day of September, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute*.

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Honorable Ali Marchant, Administrative Law Judge